2023/KER/65466

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 19TH DAY OF OCTOBER 2023 / 27TH ASWINA, 1945

RSA NO. 607 OF 2023

AGAINST THE JUDGMENT AND DECREE IN A.S.NO.70/2015 DATED 14.06.2023 ON THE FILE OF THE ADDITIONAL DISTRICT JUDGE, TIRUR AND AGAINST THE JUDGMENT AND DECREE IN O.S.NO.21/2011 DATED 30.07.2015 ON THE FILE OF THE SUB COURT, TIRUR

APPELLANT/APPELLANT/PLAINTIFF:

MOHAMED

BY ADVS.
BOBBY GEORGE
JOY C. PAUL
ELDHOSE JOY
BABY SIMON
REEJO JOHNSON
NOBLE GEORGE
ABHILASH K.P.

RESPONDENTS/RESPONDENTS/DEFENDANTS:

1 KUNHALANKUTTTY

2 ABOOBACKER@ABU
AGED 59 YEARS,

3 ALIKUTTY

4 ABDURAHIMAN

5 **ABDUL KADER**

6 **THITHEERYAKUTTY**

7 **KADEEJA**

8 **FATHIMA (DIED)**

9 **SULAIKA**

10 **ABOOTY PILATHOTTATHIL**

11 **SHABANA, 30 YEARS,**

12 **BUSNA, 28 YEARS,**

13 **RASMILA, 25 YEARS,**

14 **SHAMJIN, 24 YEARS,**

(IMPLEADED AND AMENDED AS PER ORDER IN I.A.NO.1/2022 AND I.A.NO.2/2022 DATED 24.05.2022 ON APPEAL AGAINST THE DECREE AND JUDGMENT OF THE ADDITIONAL DISTRICT JUDGE, TIRUR IN APPEAL SUIT NO.70 OF 2015)

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 19.10.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R"

JUDGMENT

Dated this the 19th day of October, 2023

This regular second appeal has been filed under order XLII Rule 1 read with Section 100 of the Code of Civil Procedure ("CPC" hereinafter) challenging the decree and judgment in A.S. No.70 of 2015 dated 14.06.2023 on the files of the Court of the Additional District Judge, Tirur arose from decree and judgment in O.S. No.21 of 2021 dated 30.07.2015 on the files of the Court of the Subordinate Judge, Tirur.

2. The appellant herein is the plaintiff in O.S. No.21 of 2015 and the respondents are the defendants.

3. Heard the learned counsel for the appellant in detail on admission.

4. Parties in this appeal shall be referred as "plaintiff" and "defendants" with reference to their status before the trial court.

5. The sum and substance of the case put up by the plaintiff is that, the plaint schedule properties originally belonged to Beeravunni alias Bappu Haji, the father of the

plaintiff and defendants. During the lifetime of Beeravunni alias Bappu Haji, he executed Will deed No. 21/1997 and separated the properties held by him in favour of the plaintiff and defendants (i.e. his heirs). The execution of the will is not disputed by the plaintiff, but the case put up by him before the trial court was that in so far as the transfer effected by the Will, the plaintiff did not consent and as per the principles of Mahomedan law, consent of all the sharers are necessary to effectuate a Will.

6. The defendants filed written statement and contended that all the parties consented the Will after the death of the father and accordingly all of them got separate possession of their respective shares covered by the Will inclusive of the plaintiff. Therefore, the plaintiff also consented the will. Hence, in view of the operation of the Will, the properties had been held by the parties of the Will and in such a case, there is no necessity of partition.

7. The trial court recorded evidence and tried the matter. PW1 examined and Ext.A1 marked on the side of the plaintiff. DWs 1 and 2 examined and Exts.B1 to B19(c) marked on the side of the defendant. Exts.C1 to C3 were also marked

as Court Exhibits.

8. On meticulous analyzation of the evidence available, the trial court found that even though there is no documentary evidence to support the consent given by the plaintiff, the available materials including the deposition of PW1 established implied consent. Thereby the suit was dismissed holding that the suit properties were not partible. Even though appeal was preferred before the Additional District Court, Tirur, as A.S. No.70 of 2015, the same also got dismissed concurring finding of the trial court.

9. While canvasing admission of the regular second appeal, the learned counsel for the plaintiff submitted that a Mahomedan Will without consent of the sharers thereto is not legal and therefore the beneficiaries therein would not get any right or title acting on them. The learned counsel for the plaintiff relied on paragraph No.117 of Mulla's Principles of Mahomedan Law, wherein it has been stated that a bequest to an heir is not valid unless the other heirs also consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share.

10. In this context, the legal question emerges is;

how far a Mahomedan can dispose of his properties by a Will? In this connection, it is relevant to extract paragraph Nos. 117 and 118 of the Mulla’s Principles of Mahomedan Law:

> ***117. Bequests to heirs*** *A bequest to an heir is not valid unless the other heirs also consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share.*
>
> *A bequest to an heir, either in whole or in part, is invalid, unless consented to by other heir or heirs and whosoever consents, the bequest is valid to that extent only and binds his or her share. Neither inaction nor silence can be the basis of implied consent."*
>
> ***118. Limit of testamentary power*** *A Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator.*

11. As provided in paragraph No.118, a Mahomedan cannot by Will dispose of more than a third of the surplus of his estate after payment of funeral expanses and debts and bequest in excess of the legal third cannot take effect, unless

the heirs consent thereto after the death of the testator.

12. The origin of this rule also been described by Mulla as under:

> *"Wills are declared to be lawful in the Koran and the traditions; and all our doctors, moreover, have concurred in this opinion": Hedaya, 671. But the limit of one-third is not laid down in the Koran. This limit derives sanction from a tradition reported by Sad Ibn Abi Waggas. It is said that the Prophet paid a visit to Sad Ibn Abi Waggas while the latter was ill and his life was despaired of. Sad Ibn Abi Waggas had no heirs except a daughter, and he asked the Prophet whether he could dispose of the whole of his property by Will to which the Prophet replied saying that he could not dispose of the whole, nor even two- thirds, nor one-half, but only one-third: Hedaya, 671. But though the limit of one-third is not prescribed by the Koran, there are indications in the Koran that a Mahomedan may not so dispose of his property by Will as to leave his heirs destitute. See Sale's Koran, Sura IV, and the Preliminary Discourse-section VI.*

13. To be on the legal question, how far a Mahomedan can dispose of his properties by a Will? the power of a Mahomedan to dispose of his property by Will is limited in two ways. Firstly, as regards the persons to whom the property may

be bequeathed, and, secondly, as regards the extent to which the property may be bequeathed. The only case in which a testamentary disposition is binding upon the heirs is where the bequest does not exceed the legal third and it is made to a person who is not an heir. But a bequest in excess of the legal third may be validated by the consent of the heirs; similarly, a bequest to an heir may be rendered valid by the consent of the other heirs. The reason is that the limits of testamentary power exist solely for the benefit of the heirs, and the heirs may, if they like to forgo the benefit by giving their consent. For the same reason, if the testator has no heirs, he may bequeath the whole of his property to a stranger: (see Baillie, 625). Where by the same Will a legacy is given to an heir and a legacy also to a non-heir, the legacy to the heir is invalid unless assented to by the other heirs, but the legacy to the non-heir is valid to the extent of one-third of the property. Say for example, A bequeaths 1/3 of his property to S, a non-heir, and 2/3 to H, one of his heirs. The other heirs do not assent to the bequest to H. The result is that S will take 1/3 under the Will, and the remaining 2/3 will be divided among all the heirs of A. Similarly, if A bequeaths the whole of his property to his wife and a non-

heir, and the bequest to the wife is not assented to by the other heirs of A, the non-heir will take 1/3 under the Will (that being the maximum disposable under the Will), and the remaining 2/3 will be divided among the heirs of A.

14. In the case at hand, the father by executing Ext.B1 Will deed given properties to all the heirs including the plaintiff. In such a Will, definitely all the heirs must consent so as to effectuate the Will. To put it otherwise, a bequest to an heir by a Mahomedan is not valid unless others consent to the bequest after the death of the testator and the consent of the other legal heirs is the exception to the above rule. Similarly, when the bequest is in favour of a non-heir then the Will will be valid without consent of the legal heirs in so far as 1/3 of the property of the testator and not otherwise. Be it so, Ext.B1 Will will take effect only when the plaintiff also consent the same, since all others consented the Will.

15. It is argued at length to convince this Court that, in this matter, there is no documents to prove the consent as rightly observed by the trial court. Therefore, the Will would not take effect. The trial court entered into finding that the Will was consented by the plaintiff merely on conjunctions and surmises

and mere conjunctions and surmises would not substitute substantive evidence to prove the matter in issue. He also pointed out that even now the building tax being paid in the name of the father and that would go to show that the properties were not partitioned or the parties do not take separate possession of the shares covered by the Will.

16. In view of the arguments, I have perused the judgment of the trial court. In the judgment of the trial court, the trial court relied on two decisions of this Court. First one is the decision reported in ***Abdulkader v. Hameedamma [1988 (2) KLT 643]***, wherein this Court held that, whether the heirs consented to the bequest after the death of the testator is a question of fact in which an acid test or hard and fast guidelines cannot be provided. Each case will depend upon its facts. Consent need not be express. It can be inferred from circumstances and conduct also. Even though the consent required is after the death of the testator, when alone the will takes effect, the conduct of the heirs during the life time of the testator with the knowledge of the disposition under the will could also be taken as a relevant factor in appreciating the state of affairs after his death to consider whether the bequest

was consented to. Consent during the life time of the testator with knowledge of the bequest coupled with long silence after the death of the testator without claiming as heir must be as to the presumption of consent. This Court further held that passive acquiescence with knowledge of the disposition also can give rise to a presumption of consent. Such acquiescence can be inferred from long silence by heirs who could have otherwise claimed as heirs. It was also held that it is the satisfaction of the court regarding consent from the circumstances that is relevant. Judicial wisdom and experience alone cold guide the court.

17. The second decision referred by the trial court is ***Naziruddin v. Hajirambee [2004 (1) KLT 896],*** it was held that inaction or silence by the plaintiff itself is an implied consent. Referring the ratio, the trial court relied on the evidence of the plaintiff as PW1 to hold that the plaintiff’s implied consent in Ext.B1 Will.

18. I have gone though the copy of deposition of PW1 placed by the learned counsel for the plaintiff. On perusal of the evidence, it could be gathered that the plaintiff is well aware of item No.4 in the plaint schedule property, which is

allotted to him as per Ext.B1 Will, by pointing out its exact boundaries on all sides specifically. He also given evidence that he had paid tax to the said property. He also given evidence that he had given instructions to the lawyer to prepare the plaint and those instructions were given on the basis of the information obtained from the Village Officer and regarding the information his evidence further is that the payment of tax was verified in the Village Office. He also stated that the details regarding plaint item No.2 property were also narrated to his counsel based on tax receipts. He also stated that for the said item also tax had been paid.

19. During further cross-examination, he stated that he is ready to show tax receipts pertaining to 22 cents of property scheduled as item No.4 in the plaint. His further testimony was that item No.4 is 27 cents and the same is only 22 cents as of now. Whereas the other shares covered by the Will were perfectly correct and he had seen tax receipts of the same. The evidence of PW1, who raised challenge against Ext.B1 Will deed No. 21/1997 for the first time in the year 2011, in fact, would show his implied consent to the Will by accepting his share as per the Will and paying tax thereof along with the surmounting circumstances discussed herein above. Thus, in the

instant suit, instituted after a pretty long time of 12 years, disputing the consent of the plaintiff, consent, in fact, to be implied from the materials available. Therefore, challenge against Ext.B1 Will, merely on the ground of absence of consent of the plaintiff, raised after 12 years of its execution would not succeed as rightly found by the trial court as well as the Appellate Court. Therefore, the regular second appeal does not deserves admission, since no substantial question of law to be decided in this matter.

20. Even though the learned counsel for the appellant/plaintiff attempted to get this appeal admitted on the submission that there is substantial question of law involved, on perusal of the available materials, this Court is of the view that no substantial question of law is involved in this matter to admit and maintain this regular second appeal.

21. In this case, the learned counsel for the appellant failed to raise any substantial question of law warranting admission of the second appeal. Order XLII Rule 2 of CPC provides thus:

> ***"2. Power of Court to direct that the appeal be heard on the question formulated by it.****-At the time of making an order under rule 11 of Order XLI for the*

hearing of a second appeal, the Court shall formulate the substantial question of law as required by section 100, and in doing so, the Court may direct that the second appeal be heard on the question so formulated and it shall not be open to the appellant to urge any other ground in the appeal without the leave of the Court, given in accordance with the provision of section 100."

22. Section 100 of CPC provides that, (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. (2) An Appeal may lie under this section from an appellate decree passed ex parte. (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal. (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. Proviso

stipulates that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

23. In the decision reported in ***[2020 KHC 6507 : AIR 2020 SC 4321 : 2020 (10) SCALE 168] Nazir Mohamed v. J. Kamala and Others***, the Apex Court held that:

> *The condition precedent for entertaining and deciding a second appeal being the existence of a substantial question of law, whenever a question is framed by the High Court, the High Court will have to show that the question is one of law and not just a question of facts, it also has to show that the question is a substantial question of law. In* ***Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, [(1999) 3 SCC 722]****, the Apex Court held that:*
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> *"After the amendment a second appeal can be filed only if a substantial question of law is involved in the case. The memorandum of appeal must precisely state the substantial question of law involved and the High Court is obliged to satisfy itself regarding the existence of such a question. If satisfied, the High Court has to*

formulate the substantial question of law involved in the case. The appeal is required to be heard on the question so formulated. However, the respondent at the time of the hearing of the appeal has a right to argue that the case in the court did not involve any substantial question of law. The proviso to the section acknowledges the powers of the High Court to hear the appeal on a substantial point of law, though not formulated by it with the object of ensuring that no injustice is done to the litigant where such a question was not formulated at the time of admission either by mistake or by inadvertence"

"It has been noticed time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under S.100 of the Code of Civil Procedure. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this section the findings of fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be

regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of fact."

"If the question of law termed as a substantial question stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second

appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal."

When no substantial question of law is formulated, but a Second Appeal is decided by the High Court, the judgment of the High Court is vitiated in law, as held by this Court in Biswanath Ghosh v. Gobinda Ghose, AIR 2014 SC 152. Formulation of substantial question of law is mandatory and the mere reference to the ground mentioned in Memorandum of Second Appeal can not satisfy the mandate of S. 100 of the CPC.

24. In a latest decision of the Apex Court reported in ***[2023 (5) KHC 264 : 2023 (5) KLT 74 SC] Government of Kerala v. Joseph***, it was held as under:

For an appeal to be maintainable under Section 100, Code of Civil Procedure ('CPC', for brevity) it must fulfill certain well – established requirements. The primary and most important of them all is that the appeal should pose a substantial question of law. The sort of question that qualifies this criterion has been time and again reiterated by this Court. We may only refer to ***Santosh Hazari v.***

> ***Purushottam Tiwari, [2001 (3) SCC 179]*** *(three – Judge Bench) wherein this Court observed as follows:*
>
> *"12. The phrase "substantial question of law", as occurring in the amended S.100 is not defined in the Code. The word substantial, as qualifying "question of law", means – of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with – technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as S.109 of the Code or Art.133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance.*

25. The legal position is no more *res-integra* on the point that in order to admit and maintain a second appeal under Section 100 of CPC, the Court shall formulate substantial question/s of law, and the said procedure is

mandatory. Although the phrase 'substantial question of law' is not defined in the Code, 'substantial question of law' means; of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with – technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of “substantial question of law” by suffixing the words “of general importance” as has been done in many other provisions such as S.109 of the Code or Art.133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. As such, second appeal cannot be decided on equitable grounds and the conditions mentioned in Section 100 read with Order XLII Rule 2 of CPC must be complied to admit and maintain a second appeal.

26. In the instant case, it appears that the decree and judgments entered into by the trial court as well as the Appellate Court based on the facts and evidence are found to be in order. Therefore, the same does not require any

interference at the hands of this Court.

27. In this matter, on evaluation of the materials, I have already discussed, no substantial question of law arises for consideration so as to admit this second appeal. It is held further that a second appeal involving no substantial question of law cannot be admitted. Therefore, the decree and judgment under challenge do not require any interference and no substantial question of law to be formulated to adjudicate in this regular second appeal.

28. Accordingly, the regular second appeal stands dismissed, without being admitted.

All interlocutory application also stands dismissed.

Sd/-

A. BADHARUDEEN
JUDGE

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